Before BOREMAN, BRYAN and J. SPENCER BELL, Circuit Judges.

BOREMAN, Circuit Judge:

This is a school case involving alleged racially discriminatory practices and the maintenance of public schools on a racially segregated basis in the City of Richmond, Virginia. In September 1961 eleven Negro pupils, their parents and guardians instituted this action to require the defendants to transfer the pupils from Negro public schools to white public schools.[1] The plaintiffs also pray, on behalf of all persons similarly situated, that the defendants be enjoined from operating racially segregated schools and be required to submit to the District Court a plan of desegregation. The District Court ordered that the individual infant plaintiffs be transferred to the schools for which they had applied. This appeal is based upon the refusal of the court to grant further injunctive relief.

Defendant, Virginia Pupil Placement Board, answered the complaint, admitting that plaintiffs had complied with its regulations pertaining to applications for transfer but denying discrimination and other allegations of the complaint. The defendants, School Board of the City of Richmond and the Richmond Superintendent of Schools, answered and moved to dismiss on the ground that sole responsibility for the placement of pupils rested with the Virginia Pupil Placement Board pursuant to the Pupil

[1] Of eleven original pupil plaintiffs, one was assigned by the Pupil Placement Board to an integrated Junior High School to which he had made application before the hearing in the District Court. His case became moot.

Placement Act of Virginia, Sections 22-232.1 through 232.17, Code of Virginia, 1950, as amended.[2]

The defendants interpreted the bill of compaint as attacking the constitutionality of the Pupil Placement Act and the motions to dismiss were grounded also on the theory that constitutionality should first be determined by the Supreme Court of Appeals of Virginia or the case should be heard by a District Court of three judges. The court below correctly denied the motions to dismiss after determining that the constitutionality of the Act had not been challenged by plaintiffs.

The record discloses that the City of Richmond is divided into a number of geographically defined attendance areas for both white and Negro schools. These areas were established by the School Board prior to 1954 and have not been materially changed since that time. It is admitted that several attendance areas for white and Negro schools overlap. The State Pupil Placement Board enrolls and transfers all pupils and neither the Richmond School Board nor the city Superintendent of Schools makes recommendations to the Pupil Placement Board.

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[2] Raised below (but not involved in this appeal) was the issue as to the joinder of the Richmond School Board and Superintendent of Schools as parties defendant. Correctly, we think, the District Court held:

> "* * * The State Pupil Placement Board has authority over the placement of pupils, and the local officials refrain from making recommendations to the Board, but approximately 98 per cent of the placements are made routinely as a result of the regulations of the School Board pertaining to attendance areas. The evidence shows that the State Pupil Placement Board has no inclination to vary these attendance areas, although undoubtedly it has authority to do so. In view of this situation, the School Board and the Superintendent of Schools are proper parties."

During the 1961-62 school term, 37 Negro pupils were assigned to "white" schools. For the 1962-63 school term, 90 additional Negro pupils had been so assigned. At the start of the 1962-63 school term, all of the "white" high schools had Negro pupils in attendance. Negro pupils also attend several of the "white" junior high schools and elementary schools.

Certain additional facts are clearly established by the record. The City School Board maintains five high schools, three for whites and two for Negroes; five junior high schools for whites and four for Negroes; eighteen elementary schools for whites and twenty-two for Negroes. As of April 30, 1962, there were 40,263 pupils in Richmond public schools, 23,177 Negroes, 17,002 whites and 84 non-whites of a race other than Negro but considered white for the purpose of assignment in the Richmond public school system. Only 37 Negroes were then attending schools which white children attended, 30 of those being in the "white" Chandler Junior High School. Three of the remaining seven were in attendance at the "white" John Marshall High School, one attended the "white" Westhampton Junior High School and three handicapped children attended the Richmond Cerebral Palsy Center. With the possible exception of the three last mentioned, these children had sought transfers from Negro schools and all but one were able to satisfy the residential and academic criteria which the Pupil Placement Board applies in case of transfers but not in case of initial enrollment. The remaining child had been admitted by court order in earlier litigation.[3]

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[3] On September 2, 1958, a suit styled *Lorna Renee Warden et al.* v. *The School Board of the City of Richmond, Virginia, et al.* was

The 1961-62 Directory of the Richmond, Virginia, Public Schools shows "White Schools" in one division and "Negro Schools" in the other. The "White Schools" are staffed entirely with faculties and officials of the Caucasian race. The schools listed as "Negro Schools" are staffed entirely with faculties and officials of the Negro race.

Thus it is clear, as found by the District Court, that Richmond has dual school attendance areas; that the City is divided into areas for white schools and is again divided into areas for Negro schools; that in many instances the area for the white school and for the Negro school is the same and the areas overlap. Initial pupil enrollments are made pursuant to the dual attendance lines. Once enrolled, the pupils are routinely reassigned to the same school until graduation from that school. Upon graduation, the pupils are assigned in the manner found by the District Court to be as follows:

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instituted in the District Court, praying, *inter alia*, that a permanent injunction be entered restraining the Richmond School Board and its division Superintendent of Schools from any and all actions that regulate or affect, on the basis of race or color, the admission, enrollment or education of the infant plaintiffs, or any other Negro child similarly situated, to and in any public school operated by the defendants.

That suit was decided on July 5, 1961. The District Court ordered that the then one remaining Negro plaintiff be transferred from the Negro school located five miles from her home and admitted to the white school in her neighborhood. However, the court denied class relief, stating: "There is no question as to the right of the infant plaintiff to be admitted to the schools of the City of Richmond without discrimination on the ground of race. She is admitted, however, as an individual, not as a class or group; and it is as an individual that her rights under the Constitution are asserted."

The court refused to grant a permanent injunction and dismissed the case from the docket.

"* * * [A]ssignments of students based on promotion from an elementary school to a junior high school and from a junior high school to high school are routinely made by the Pupil Placement Board. These assignments generally follow a pattern, aptly described as a system of 'feeder schools', that existed prior to 1954. Thus, a student from a white elementary school is routinely promoted to a white junior high school and in due course to a white high school. A Negro student is routinely promoted from a Negro elementary school to a Negro junior high school and finally a Negro high school. In order to change the normal course of assignment based on promotion all students must apply to the Pupil Placement Board. The majority of the plaintiffs in the present case are such applicants."

As of April 30, 1962, a rather serious problem of overcrowding existed in the Richmond Negro public schools. Of the 28 Negro schools, 22 were overcrowded beyond normal capacity by 1775 pupils and the combined enrollments of 23 of the 26 white schools were 2445 less than the normal capacity of those schools. For the current 1962-63 school term, the applications for transfers from Negro to white schools of only 127 Negro pupils had been granted.

Four of the infant plaintiffs, who had completed elementary school, sought admission to the white Chandler Junior High School. After comparing test scores of these pupils with test scores of other pupils, the Pupil Placement Board denied the applications on the ground of lack of academic qualifications. These plaintiffs contended that pupils from white elementary schools in the same attendance

area are routinely placed in Chandler Junior High and their scholastic attainments or qualifications are not scrutinized by the Pupil Placement Board. The District Court concluded that academic criteria were applied to Negro pupils seeking transfer based on promotion, which criteria were not applied to the white pupils promoted from elementary schools to junior high schools. This, said the court, is discriminatory and is a valid criticism of the procedure inherent in the system of "feeder schools". The court further stated:

> "Proper scholastic tests may be used to determine the placement of students. But when the tests are applied only to Negroes seeking admission to particular schools and not to white students routinely assigned to the same schools, the use of the tests can not be sustained. Jones v. School Board of the City of Alexandria, 278 F. 2d 72 (4th Cir. 1960)."

Another of the Negro plaintiffs, who was promoted from a Negro junior high school, sought admission to the "white" John Marshall High School. His application had been denied because he lived thirteen blocks from the John Marshall High School and only five blocks from a Negro high school. However, it was pointed out in the court below that this plaintiff lives in the attendance area of the John Marshall High School and, had he been a white student, he would have been routinely assigned there without considering the distance of his residence from that school or from another high school. The District Court said: "* * * Residence may be a proper basis for assignment of pupils, but it

is an invalid criteria when linked to a system of 'feeder schools'. Dodson v. School Board of the City of Charlottesville, 289 F. 2d 439 (4th Cir. 1961)."

The remaining five plaintiffs sought transfers from the Graves Junior High School (Negro) to the "white" Chandler Junior High School. They were denied transfer by the Pupil Placement Board because of lack of academic qualifications. The evidence showed that the same standards for determining transfers, upon application, from one junior high school to another junior high school were applied by the Board indiscriminately to both white and Negro pupils. The District Court stated:

> "* * * Were this the only factor in this phase of the case, the issue would involve only judicial review of the decision of an administrative board. However, the situation of these plaintiffs must be considered in the context of the system of 'feeder schools', which routinely placed them in the Graves Junior High School while white students routinely were placed in Chandler Junior High School. The application of scholarship qualifications under these circumstances is discriminatory. Green v. School Board of the City of Roanoke [304] F. 2d [118] (4th Cir., May 22, 1962)."[4]

With respect to a determination of the rights of all of the infant Negro plaintiffs, the District Court held:

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[4] The case to which the District Court referred is styled *Green v. School Board of City of Roanoke, Virginia,* and is now reported in 304 F. 2d 118.

"The foregoing facts and conclusions of law require the admission of the plaintiffs to the schools for which they made application."

An appropriate order was entered enjoining and restraining the defendants from denying the infant plaintiffs, therein named, admission to the schools for which they had made application. The defendants have not appealed from this order.

It follows that each infant plaintiff has been granted the relief which he or she individually sought. But the District Court, although expressing its disapproval of the "feeder school system" as now operating in the City of Richmond, denied further injunctive relief. The case was ordered retained on the docket for such further relief "as may be appropriate".[5]

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[5] In its written opinion the District Court stated as follows:

"The plaintiffs prayed that the defendants be enjoined from continuing discrimination in the city schools and that the School Board be required to submit a desegregation plan. The Court has weighed all of the factors presented by the evidence in this case and finds that the defendants have taken measures to eliminate racially discriminatory enrollments in the first grade. Apparently they are eliminating discriminatory enrollments in George Wythe High School [white] and they are routinely assigning Negro students in white junior high schools to white high schools.

"While the School Board has not presented a formal plan of desegregation, the Court finds that the defendants have made a reasonable start toward a nondiscriminatory school system resulting in the attendance of 127 Negro students in white schools for the 1962-1963 school term. In view of the steps that have been taken in this direction, the Court concludes that the defendants should be allowed discretion to fashion within a reasonable time the changes necessary to eliminate the remaining objectionable features of the system of 'feeder schools'.

(footnote continued on following page)

The conclusion of the District Court that a "reasonable start toward a non-discriminatory school system" had been made appears to have been based primarily upon consideration of four factors discussed in its opinion as follows:

> "Rigid adherence to placement of students by attendance areas has been modified in four respects. First, the Chairman of the Pupil Placement Board testified that any Negro child applying for enrollment in the first grade of a white public school in his attendance area is assigned to that school. Second, the Superintendent of Schools testified that George Wythe High School and John Marshall High School had been constructed to accommodate all high school students in their respective attendance areas. Counsel stated in argument that six Negro students had applied for admission to George Wythe High School for 1962 and all had been accepted. Third, a Negro student presently attending a white school, upon promotion to a higher school, is routinely assigned to a white school. Fourth,

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"In Brown v. Board of Education, 349 U. S. 294, 300 [75 S. Ct. 753, 99 L. Ed. 1083] (1955), the Supreme Court stated 'Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.' The Court is of the opinion that the relief decreed in this case is sufficient at this time in view of the evidence presented. The refusal of broad injunctive relief now is not to be construed as approval to continue the 'feeder school system' as it is now operated. See Hill v. School Board of the City of Norfolk, Virginia, 282 F. 2d 473 (4th Cir. 1960); Dodson v. School Board of the City of Charlottesville, 289 F. 2d 439 (4th Cir. 1961).

"This case will be retained on the docket for such further relief as may be appropriate."

some Negro students have been assigned to schools in white attendance areas."

In the context of this case the principal questions to be determined may be stated as follows: (1) Are these four basic factors cited by the District Court sufficient to evidence a reasonable start toward maintaining a non-discriminatory school system and consistent with the true concept of equal constitutional protection of the races; and (2) should the court have granted further injunctive relief? We think question (1) must be answered in the negative and question (2) in the affirmative in view of the discriminatory attitude displayed by the Pupil Placement Board toward the transfers sought by the infant plaintiffs in the instant case and which transfers, denied as the result of discriminatory application of residential and academic criteria, were effected only through this protracted litigation.

It is notable that there is no assertion here, as in some of the other school cases, of a defense based upon a claim that a reasonable start has been made toward the elimination of racially discriminatory practices coupled with a suggestion that additional time, consistent with good faith compliance at the earliest practicable date, is necessary in the public interest. Instead, the answer of the City school authorities denied that anything done or omitted by them had given rise to the present litigation. The answer of the Pupil Placement Board admitted that the plaintiffs had complied with its administrative procedures but denied and demanded strict proof of racial discrimination.

One of the interrogatories served by the plaintiffs was: "What obstacles, if any, are there which will prevent the

racially non-discriminatory assignment of students to public schools in the City of Richmond at the commencement of the 1962-1963 school session?". The local school authorities side-stepped the question by claiming to be unable to answer because all power to assign students to schools had been vested by law in the Pupil Placement Board. That Board replied to the interrogatory as follows: "* * * [T]hat to the extent that such question implies discrimination, such implication is denied and that such question lacks sufficient specificity to evoke an intelligent answer which does not involve broad conclusions or have argumentative deductions. Aside from that, and under Brown v. Board of Education, *these defendants know of no reason why students should not be assigned to public schools without discrimination on the ground of race, color, or creed.*" (Emphasis added.)

The Superintendent of Schools testified that the City School Board had not attempted to meet the problem of overcrowded schools by requesting that Negro pupils in overcrowded schools in a given area be assigned to schools with white pupils. He stated that some new schools and additions to existing schools had been provided. The record discloses that the earlier litigation, Warden v. The School Board of the City of Richmond, referred to in our footnote 3, was instituted on September 2, 1958. At a special meeting held on September 15, 1958 (approximately two weeks after the beginning of the school term), the School Board voted to request the Pupil Placement Board to transfer the pupils then attending the Nathaniel Bacon School (white) to the East End Junior High School (white), and that a sufficient number of pupils be transferred from the George Mason

(Negro) and Chimborazo (Negro) schools to the Nathaniel Bacon building to utilize its capacity, thus converting Nathaniel Bacon to a Negro school.

The attitude of the City school authorities, as disclosed by the Superintendent of Schools in his testimony, is and has been "that the state law took out of the hands of the School Board and the Superintendent of Schools any decision relating to the integration of schools [and that] * * * it has been a feeling of both the School Board and the Administration that any conflict that might exist between the state and federal law should be decided by the Courts, not by the School Board and the Administration."

The following is taken from the testimony of the Chairman of the Pupil Placement Board:

> "Q. Well, what do you do where you have overlapping school zones and school areas?
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> "A. You have got that, of course, in Richmond.
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> "Q. Yes.
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> "A. Normally, I would say fully 99 per cent of the Negro parents who are entering a child in First Grade prefer to have that child in the Negro school. Judging by the small number of applications we get, that must be true. Now, we do not think that this Board was appointed for the purpose or that the law required the attempt on our part to try to integrate every child possible. What we thought we were to do was to be completely fair in considering the requests of Negroes, we will say, to go into White schools, but certainly not trying to put those in that didn't want to go in.

"Now, when a Negro parent asks for admission of his child in the First Grade of a White school, very clearly he is asking for desegregation or for integration, or whatever you want to call it, and he gets it. And it is true that *in general there will be two schools that that child could attend in his area, one White and one Negro, and we assume that the Negro wants to go to the Negro school unless he says otherwise,* but if he says otherwise, he gets the other school." (Emphasis supplied.)

It is true that the authority for the enrollment and placement of pupils in the State of Virginia has been lodged in the Pupil Placement Board[6] unless a particular locality elects to assume sole responsibility for the assignment of its pupils.[7] The School Board of the City of Richmond has assumed no responsibility whatever in this connection. It does not even make recommendations to the Pupil Placement Board as to enrollments, assignments or transfers of pupils. It here defends charges against it of racial discrimination in the operation of the City's schools on the ground that the sole responsibility is that of the State Board. At the same time the system of dual attendance areas which has operated over the years to maintain public schools on a racially segregated basis has been permitted to continue. Though many of the Negro schools are overcrowded and white schools are not filled to normal capacity, the only effort to alleviate this condition has been to provide new buildings or additions to existing buildings, a move ob-

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[6] Va. Code Ann. §§22—232.1-232.17 (Supp. 1960).

[7] Va. Code Ann. §§22—232.18-232.31 (Supp. 1960).

viously designed to perpetuate what has always been a segregated school system.

It is clear that the pupil assignments are routinely made by the Pupil Placement Board. The Chairman of that Board says that now initial enrollments are on a voluntary basis and a Negro child may be enrolled in a white school upon request. But in the absence of a request, the long established procedure of enrollment of Negro children in Negro schools and white children in white schools persists. Then the "feeder" system begins to operate and the only means of escape is by following the prescribed administrative procedure of filing requests or applications for transfer. The difficulties to be encountered in pursuing this course are graphically demonstrated by the experiences of the infant plaintiffs in this litigation. They were able to escape from the "feeder" system only after the District Court made possible their release by ordering transfers.

A Negro child, having once been caught in the "feeder" system and desiring a desegregated education, must extricate himself, if he can, by meeting the transfer criteria. As this court said in Green v. School Board of City of Roanoke, Virginia, 304 F. 2d 118, 123 (4th Cir. 1962):

> "* * * These are hurdles to which a white child, living in the same area as the Negro and having the same scholastic aptitude, would not be subjected, for he would have been initially assigned to the school to which the Negro seeks admission."

It was pointed out in Jones v. School Board of City of Alexandria, Virginia, 278 F. 2d 72, 77 (4th Cir. 1960), that, by reason of the existing segregation pattern, it will be

Negro children, primarily, who seek transfers. The truth of this statement is evidenced by the fact that in Richmond only 127 Negro children out of a total of more than 23,000 are now attending previously all-white schools. This court further said in Jones, supra: "Obviously the maintenance of a dual system of attendance areas based on race offends the constitutional rights of the plaintiffs and others similarly situated * * *" 278 F. 2d 72, 76.

In recent months we have had occasion to consider the legality of other "feeder" systems found in operation in the public schools of Roanoke County, Virginia, and in the City of Roanoke, Virginia. See Marsh v. County School Board of Roanoke County, Va., 305 F. 2d 94 (4th Cir. 1962), and Green v. School Board of City of Roanoke, Virginia, 304 F. 2d 118 (4th Cir. 1962). In those cases, in opinions prepared by Chief Judge Sobeloff, the unconstitutional aspects of the systems there in operation were discussed in the light of the decisions of the Supreme Court in Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), and 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), and in the light of numerous prior decisions of this and other courts. We find it unnecessary to again cite or review the pertinent decisions applicable to the maintenance of racially segregated school systems. In the Marsh and Green cases we reached the conclusion that injunctive relief, not only for the individual plaintiffs but for those who might find themselves confronted with the same problems, was justified.

A start has, indeed, been made to end *total* segregation of the races in the Richmond schools. The first step has been taken, one which, no doubt, was distasteful to those who are traditionally and unalterably opposed to an integrated

school system. But, upon this record and from the statements of the school officials, we find nothing to indicate a desire or intention to use the enrollment or assignment system as a vehicle to desegregate the schools or to effect a material departure from present practices, the discriminatory character of which required the District Court to order relief to the infant plaintiffs before it. In the present status in which the case was left by the District Court, the school authorities are yet free to ignore the rights of other applicants and thus to require the parents of new applicants to protest discriminatory denials of transfers, to require an infant applicant with his or her parents to attend a hearing on the protest which is not likely to be held earlier than August of 1963, and then to require the applicants to intervene in the pending litigation (possibly to be met with defensive tactics calculated to result in delay), the applicants fervently hoping to obtain relief from the court not long after the beginning of the 1963-64 school session if such relief is to be meaningful.

The School Board of the City of Richmond has abdicated in favor of the Pupil Placement Board leaving the latter with a school system which, in normal operation, has demonstrated its potential as an effective instrumentality for creating and maintaining racial segregation. Nearly nine years have elapsed since the decisions in the Brown v. Board of Education cases and since the Supreme Court held racial discrimination in the schools to be unconstitutional. The Richmond school authorities could not possibly have been unaware of the results of litigation involving the school systems of other cities in Virginia, notably Norfolk, Alexandria, Charlottesville and Roanoke. Despite the knowledge

which the authorities must have had as to what was happening in other nearby communities, the dual attendance areas and "feeder" system have undergone no material change.

Assignments on a racial basis are neither authorized nor contemplated by Virginia's Pupil Placement Act. We are told that initial assignments are now made on a purely voluntary basis but the Placement Board *assumes* that a Negro child prefers to attend a school with children of his own race and he is so assigned unless otherwise requested. Richmond's administration of her schools has been obviously compulsive and it is evident that there has been little, if any, freedom of choice.

> "Though a voluntary separation of the races in schools is uncondemned by any provision of the Constitution, its legality is dependent upon the volition of each of the pupils. If a reasonable attempt to exercise a pupil's individual volition is thwarted by official coercion or compulsion, the organization of the schools, to that extent, comes into plain conflict with the constitutional requirement. A voluntary system is no longer voluntary when it becomes compulsive." See Jeffers v. Whitley, 309 F. 2d 621, 627 (4th Cir. 1962).

Notwithstanding the fact that the Pupil Placement Board assigns pupils to the various Richmond schools without recommendation of the local officials, we do not believe that the City School Board can disavow all responsibility for the maintenance of the discriminatory system which has apparently undergone no basic change since its adoption. Assuredly it has the power to eliminate the dual attendance

areas and the "feeder" system which the District Court found to be primarily responsible for the discriminatory practices disclosed by the evidence. It would be foolish in the extreme to say that neither the City School Board nor the Pupil Placement Board has the duty to recognize and protect the constitutional rights of pupils in the Richmond schools. That there must be a responsibility devolving upon some agency for proper administration is unquestioned. We are of the opinion that it is primarily the duty of the School Board to eliminate the offending system.[8]

In these circumstances, not only are the individual infant plaintiffs entitled to relief which has been ordered but the plaintiffs are entitled, on behalf of others of the class they represent and who are similarly situated, to an injunction against the continuation of the discriminatory system and practices which have been found to exist. As we clearly stated in Jeffers v. Whitley, 309 F. 2d 621, 629 (4th Cir. 1962), the appellants are not entitled to an order requiring the defendants to effect *a general intermixture of the races in the schools* but they are entitled to an order enjoining the defendants from refusing admission to any school of any pupil *because of the pupil's race*. The order should prohibit the defendants' conditioning the grant of a requested transfer upon the applicant's submission to futile, burdensome or discriminatory administrative procedures. If there is to be an absolute abandonment of the dual attendance area and "feeder" system, if initial assignments are to be on a non-

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[8] *Brown* v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954); *Brown* v. *Board of Education*, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955); *Cooper* v. *Aaron*, 358 U. S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958).

discriminatory and voluntary basis, and if there is to be a right of free choice at reasonable intervals thereafter, consistent with proper administrative procedures as may be determined by the defendants with the approval of the District Court, the pupils, their parents and the public generally should be so informed.

If, upon remand, the defendants desire to submit to the District Court a more definite plan, providing for immediate steps looking to the termination of the discriminatory system and practices "with all deliberate speed," they should not only be permitted but encouraged to do so.

The District Court should retain jurisdiction of this case for further proceedings and the entry of such further orders as are not inconsistent with this opinion.

Reversed in part and remanded.

ALBERT V. BRYAN, Circuit Judge (dissenting in part).

I see no need for the prospective injunction. With fairness and clarity the opinion of the Court comprehensively discusses and approves the course the District Court prescribed for the defendants to follow in the future. With no reason to believe his directions will not be respected, the District Judge refused the injunction. In this he exercised the discretion generally accorded the trial judge in such situations, especially when the necessity for an injunction must be measured by local conditions. Of these we have no knowledge more intimate than his. I would not add the injunction.

Memorandum of the Court

[Filed March 16, 1964]

The Court of Appeals for the Fourth Circuit, when remanding this case for the entry of an injunction, said in *Bradley* v. *School Board of the City of Richmond, Virginia*, 317 F. 2d 429, 438 (4th Cir. 1963):

> "If, upon remand, the defendants desire to submit to the District Court a more definite plan, providing for immediate steps looking to the termination of the discriminatory system and practices 'with all deliberate speed,' they should not only be permitted but encouraged to do so."

Pursuant to the foregoing paragraph in the opinion of the Court of Appeals, the School Board submitted a plan in the form of a resolution providing as follows:

> "(a) Recommendations for assignment of pupils seeking enrollment in the public school system for the first time or initial enrollment in the junior or senior high schools shall be made upon consideration of the distance the pupils live from such schools; the capacity of such school; availability of space in other schools; whether the program of the pupil can be met by such school; the school preference as shown on the pupil placement application form; and what is deemed to be in the best interest of such pupil.
>
> "(b) The school administration shall recommend that pupils be assigned to the schools which they at-

tended the preceding year, except those eligible for promotion to another school. However, application may be made by the parent, guardian or other person having custody of such pupils for their placement in another school named in the application in which case the reason for the requested transfer should be stated. The school administration may recommend to the Pupil Placement Board that such application be approved if it be deemed to be in the best interest of the pupil.

"(c) Applications for transfers to a particular school must be made and received by the school administration before June 1 preceding the school year to which the placement requested is to be applicable."

The plaintiffs filed exceptions to the plan and the Court conducted a hearing on its sufficiency. The exceptions are:

"1. The plan fails to satisfy the requirement of the opinion of the United States Court of Appeals for the Fourth Circuit that the Richmond City School Board

"(a) eliminate the dual system of attendance areas in the initial assignment of pupils to schools.

"(b) end the feeder system of assigning pupils to schools, and

"(c) refrain from conditioning the grant of a requested transfer on burdensome or discriminatory criteria.

"2. Paragraph 1(a) of the plan (which provides for initial enrollment in the school system or in junior or senior high schools) is vague and indefinite and is inadequate to protect the constitutional rights of the Negro pupils to racially non-discriminatory school assignments.

"(a) This provision confers on the school administration unlimited discretion to assign pupils, including racially determined assignments. It fails to provide standards to govern the exercise of the superintendent's discretion in making assignments, thus conferring an absolute discretion which renders the caveat against racial discrimination meaningless, and thus does not adequately protect against the use of racial considerations in placing pupils in schools.

"(b) This provision purports to indicate a general basis for determining school attendance areas. The formulation of standards for determining attendance areas is, of course, within the control of the defendants so long as race is not used in determining zones, selecting school sites, etc.; however, the general statement made in the plan, without any indication of specific school zones to be used either next year or in any subsequent years, affords the Court no basis upon which to appraise the practical impact of an order approving the plan or any part of it. It is not possible to determine whether or not the

plan would in fact accomplish any desegregation of the school system.

"3. Paragraph 1 (b) of the plan (which provides for the transfer of pupils) is calculated to frustrate rather than protect the rights of Negro pupils to racially nondiscriminatory school assignments.

"(a) This provision requires the assignment of pupils in accordance with the dual zones which have been condemned by the Court of Appeals and by this Court in this case and in many other cases.

"(b) It then provides that in order to escape this assignment, the pupil must induce his parents to follow the state's Pupil Placement Board procedure which, in a form more favorable to the rights of the Negro child, was condemned by the Court of Appeals and by this Court in this case. Now, instead of refraining from making a recommendation, the school administration is given permission to make a favorable recommendation, '. . . if it be deemed to be in the best interest of the pupil.'

"4. Plaintiffs object to the plan in that it omits any provision for the assignment or reassignment of teachers and staff of the schools on a nonracial basis. In this connection, plaintiffs assert their personal rights to attend a school system in which there is no racial segregation or discrimination.

"5. Plaintiffs object to the plan in that it fails to provide any arrangement for the desegregation of

special education programs now conducted or which may be conducted in the future, including such things as special classes for the handicapped or gifted pupils, kindergarten, or other pre-school programs, adult education programs, summer school programs, etc. In this connection, the plan fails to provide for the desegregation of the special project for the improvement of culturally deprived children being financed by the Ford Foundation and being conducted in several of the city's schools on a segregated basis.

"6. Plaintiffs further object that the plan makes no provision for pupils seeking or needing education in specialized courses."

For the purpose of evaluating the resolution the Court has considered its interpretation by the School Board and administrative authorities. From the resolution and the evidence pertaining to its interpretation and administration the Court finds that the plan by which pupils are assigned to schools provides:

1. Each child entering first grade may attend any school of his choice. The choice of the pupil must be indicated. He is not assigned to any school until he makes application to a specific school.

2. Each pupil is assigned to the school where he is presently enrolled until he completes the grades offered in that school; but a pupil has the unqualified right to transfer

for the next school year to any other school which has the capacity to receive him. At the present time no school is designated as filled to capacity and therefore this factor is not a restriction upon transfers.

3. The parents of each pupil who completes the last grade in an elementary or junior high school must indicate the school the pupil wishes to attend. Each pupil has an unqualified right to attend any school of his choice subject to capacity which presently is not a restrictive factor.

4. Attendance areas have been abolished.

5. The "feeder system" of schools has been abolished.

6. All requests for transfer for the following school year must be submitted before June 1.

7. Forms and instructions are provided at each school to enable pupils to transfer. Principals are required to give pupils information about their rights to school assignments.

8. The actual assignment is made by the pupil placement board upon recommendation of the School Board.

9. The plan encompasses all public schools in the City.

The foregoing constitute the essential elements of the plan as it is now being administered. The Court also finds:

10. The plan went into effect in September 1963. No student who applied for transfer before May 31 was denied

admission to a school of his choice. Two students who sought transfers after May 31 were denied. (The Court directed their admission under the injunction previously entered.)

11. Certain criteria mentioned in the resolution have not yet been applied to deny any pupil admission to a school. These pertain to the "distance the pupils live from such schools * * * whether the program of the pupil can be met by such school * * * and what is deemed to be in the best interest of such pupil."

12. The plan makes no reference to the employment of Negro and white faculty and staff.

Conclusions of Law

The plan, as presently administered, generally conforms with the description of a voluntary system found in *Jeffers* v. *Whitley,* 309 F. 2d 621, 624 (4th Cir. 1962). It is approved subject to the following qualifications. The resolution is framed in such broad language that its validity depends upon the interpretation placed upon it by the School Board and the manner in which it is administered. Presently this is valid. The School Board must not, however, vary the plan's interpretation or administration without securing the Court's approval of amendments setting forth any changes they propose.

The plan has been described by the defendants as a "freedom of choice plan." To condition "freedom of choice" upon the School Board's determination of the "best interest

of such pupil" is anomalous. Moreover, the "best interest" criterion is unduly vague. No students have yet been denied admission to a school because of this provision. Consequently neither interpretation nor administration furnishes a guide for determining its validity. The School Board, therefore, must not deny admission or transfer of a pupil because of the "best interest" provision until they secure approval of an amendment to the plan making more definite this requirement.

No pupil has been denied admission to any school by reason of the residential or "program" criteria mentioned in the resolution. Reasonable, non-discriminatory scholastic and residential requirements are not invalid. See *Green* v. *School Board of the City of Roanoke, Virginia,* 304 F. 2d 118, 123 (4th Cir. 1962).

Transfers conditioned on "whether the program of the pupil can be met" by the school to which the pupil seeks admission should present little difficulty if approval of the transfer is based solely upon whether the courses the pupil seeks are taught in the school. Experience has shown, however, that evaluation of a pupil's "program" through academic achievement tests presents serious obstacles. *Green* v. *School Board of the City of Roanoke, Virginia,* 304 F. 2d 118 (4th Cir. 1962).

At present no school is filled to capacity. If this situation should change, care must be exercised to avoid discrimination in formulating definite residential requirements, cf. *Marsh* v. *County School Board of Roanoke County, Virginia,* 305 F. 2d 94 (4th Cir. 1962).

Jackson v. *School Board of City of Lynchburg,* 321 F. 2d 230, 233 (4th Cir. 1963) pointed out that assignment of faculty was a suitable element for inclusion in a school board's plan. See also *Board of Public Instruction of Duval County, Florida* v. *Braxton,* 326 F. 2d 616 (5th Cir. 1964). It does not appear, however, that the absence of such provisions requires the rejection of a plan for the assignment of pupils.

The requirement that applications for transfer be submitted prior to June 1 is reasonable when applied in a nondiscriminatory manner. Planning for the next school year necessitates knowledge of the conditions that will exist. The date conforms with the regulation of the State Pupil Placement Board under which many transfers of Negro pupils were made last year. This Court previously has conditioned assignment upon compliance with this administrative requirement, e.g. *McLeod* v. *County School Board of Chesterfield County,* No. 3431, E. D. Va., Nov. 15, 1962. It has not, however, been included as a prerequisite to assignments in injunctions granted since the Court of Appeals directed this Court to encourage the submission of plans by local school boards. *Bradley* v. *School Board of the City of Richmond, Virginia,* 317 F. 2d 429, 438 (4th Cir. 1963).

The information about the plan appears to have been well disseminated last year. The method employed, as shown by the evidence was not insufficient. Here again, however, much depends on the administration of the plan. If further experience indicates that more notification of the

rights of pupils should be given, the Court will receive the suggestions of the parties. *Jeffers* v. *Whitley*, 309 F. 2d 621, 629 (4th Cir. 1962).

With approval of the School Board's plan, the injunction entered June 6, 1963 will be dissolved. The case, however, will be retained on the docket with leave of any party to seek further relief.

The temporary restraining order admitting William Pernell Andrews and Martha Melvina Boston to George Wythe High School will be made permanent. They qualified for admission under the terms of the general injunction entered June 6, 1963.

The plaintiffs have moved for the allowance of counsel fees. Since the submission of a plan was not a mandate placed upon the School Board, the Court deems inappropriate the allowance of counsel fees with respect to the hearings on the plan.

Counsel for the plaintiffs did, however, appear on behalf of two students who were improperly denied admission to George Wythe High School. Counsel fees in the amount of $75.00 will be allowed the plaintiffs' attorneys for this phase of the case. *Bell* v. *School Board of Powhatan County, Virginia*, 321 F. 2d 494, 500 (4th Cir. 1963); *Scott* v. *School Board of the City of Fredericksburg*, No. 3438, E. D. Va., Sept. 19, 1963.

JOHN D. BUTZNER, JR.
United States District Judge

Order

[Entered March 16, 1964]

For reasons stated in the Memorandum of the Court this day filed, it is ADJUDGED and ORDERED:

1. The plan of the School Board of the City of Richmond is approved to the extent mentioned in the Memorandum of the Court.

2. The injunction entered June 6, 1963 is dissolved.

3. The defendants, and each of them, their successors in office, agents and employees are enjoined from denying admission to William Pernell Andrews and Martha Melvina Boston to George Wythe High School.

4. The motion for allowance of counsel fees with respect to hearings on the School Board's plan is denied.

5. Counsel for the plaintiffs are jointly allowed counsel fees in the amount of $75 against the School Board of the City of Richmond and the Division Superintendent of Schools for their appearance in behalf of pupils denied admission to George Wythe High School in September 1963.

Let the Clerk send copies of this order and the Memorandum of the Court to counsel of record.

JOHN D. BUTZNER, JR.
United States District Judge

Opinion of April 7, 1965

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9471

CAROLYN BRADLEY and MICHAEL BRADLEY, infants, by MINERVA BRADLEY, their mother and next friend, *et al.*,

Appellants,

versus

THE SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, H. I. WILLETT, Division Superintendent of Schools of the City of Richmond, Virginia, and E. J. OGLESBY, ALFRED L. WINGO and E. T. JUSTIS, individually and constituting the Pupil Placement Board of the Commonwealth of Virginia,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
John D. Butzner, Jr., District Judge.

(Argued October 5, 1964. Decided April 7, 1965.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH, BOREMAN, BRYAN, and J. SPENCER BELL, Circuit Judges, sitting en banc.

Henry L. Marsh, III, and S. W. Tucker for Appellants, and Henry T. Wickham, Special Counsel, City of Richmond (J. Elliott Drinard, City Attorney of Richmond, and Tucker, Mays, Moore & Reed on brief), for Appellees The School Board of the City of Richmond, Virginia, and H. I. Willett, Division Superintendent of Schools of Richmond, Virginia.

HAYNSWORTH, *Circuit Judge*:

This is the second time the second of two Richmond school cases has been before us. This time the principal question is whether the School Board adequately discharges its duty under the law when it gives to every pupil an unrestricted right to attend the school of his choice, or that of his parents. The District Court held that it does, and we agree. There are other subsidiary questions.

I

This case was begun by eleven Negro pupils and their parents or guardians. The eleven pupils had been denied admission to schools attended entirely, or predominantly, by white pupils. Before trial, one was admitted to the school of his choice, and the Court ordered the admission of the remaining ten. In doing so, the Court found that, in general, assignments were being made on the basis of dual attendance zones, that promotions from primary to junior high schools and from junior high schools to senior high schools were controlled by a feeder system, and that trans-

fer requests by Negroes attending Negro schools were denied on the basis of criteria which were not employed in processing the applications of white pupils living in the same residence area and wishing to attend the same school to which the Negro pupils sought to be transferred. These discriminatory practices, of course, were condemned, and it was because they had been employed that the District Judge ordered the admission of the remaining ten plaintiffs.

While the District Judge thus clearly pointed up the faults in the practices which had governed school assignments for the 1961-1962 school year, the requested general injunctive order was denied. Denial of injunctive relief beyond the requirement of enrollment of the individual plaintiffs in the schools of their choice was predicated upon the Court's finding that the School Board had taken affirmative steps to eliminate discriminatory practices in handling enrollments in the first grade of all primary schools and in those of one of the high schools.

On the first appeal the question in this Court was whether the District Court should have granted general injunctive relief in addition to requiring the admission of the individual plaintiffs. We concluded[1] that he should have issued the requested injunction because of the evident fact that discriminatory practices had been followed in handling admissions and transfer applications. One member of this Court dissented upon the ground that he thought an in-

[1] Bradley v. School Board of City of Richmond, Virginia, 4 Cir., 317 F. 2d 429.

junction unnecessary since the District Court had clearly pointed out to the Board what was necessary to be done, and there was no reason to suppose that the Board would not do it. The case was to be retained upon the docket, which was adequate, in the opinion of the dissenter, to assure that if further relief became requisite, it could be had readily.

The first appeal in this case was brought to this Court by the plaintiffs, not by the School Board, and in this Court the Board did not take issue with the conclusions of the District Court about the deficiencies in its earlier handling of admissions and transfer applications. It suggested a willingness to comply with the requirements outlined in the District Judge's memorandum opinion, contending only that it should have a reasonable opportunity to do so without the need of a formal injunctive order.

It was thus not surprising that while the first appeal was still in the bosom of this Court, the Richmond School Board adopted resolutions designed to eliminate the objectionable features in the practices theretofore followed by it and the Virginia Pupil Placement Board.

These resolutions, adopted in March, 1963, as subsequently construed and limited by the District Court, provide that every pupil initially entering the Richmond School system, or his parent for him, is required to state his choice as to the school he wishes to attend. He is assigned to the school of his choice. Every pupil promoted from any elementary school in Richmond, or his parent for him, is required to make a similar choice, and he is assigned to the school of his choice, as are those promoted from junior high

school to senior high school. Every other pupil is assigned to the school he previously attended, but he may apply for a transfer to any other school, and, since transfer requests are routinely granted without hearings or consideration of any limiting criteria;[2] he is assigned to the school of his choice. When this case was orally argued in this Court on October 5, 1964, we were assured that no timely transfer application had been denied since adoption of the resolutions of March, 1963.

Since pupils have been assigned in the Richmond schools pursuant to the 1963 scheme for the 1963-4 and 1964-5 school years, it appears that every pupil in the first two grades of primary school, junior high school and senior high school are attending the school affirmatively selected by him or his parents as the one he and they wished him to attend. Every other pupil in the school system has and has had an unrestricted right of transfer, which the District Court found had been adequately publicized and made known to pupils and parents.

Under the School Board's resolutions, as construed by the District Court, all attendance areas have been abandoned; there is no longer a feeder system for handling promotions from one level to another, and transfer requests are allowed without discriminatory conditions.

There are some limiting factors. Transfer applications by one previously assigned to a school must be submitted

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[2] The resolution provides that school capacity may be a limiting factor. As a practical matter it has not been thus far. That matter is discussed, infra.

before June 1 to be granted effectively as of the opening of the next school year. This requirement the District Court found reasonable in light of the planning needs of the Board. There is also a provision that a transfer application by a pupil previously assigned to a school may be denied, if the school to which entry is sought does not have the capacity to receive him. The plan does not spell out what would happen in the event of a denial of an application upon the ground of want of capacity, but the District Judge thought that the reservation was not of practical importance because, so far, there has been no want of capacity to allow all transfer applications, and no transfer request has been denied on that ground, or, indeed, for any other reason except lack of timeliness.[3]

Upon remand of the case after the first appeal, the District Court entered an appropriate general injunction in conformity with the opinion of this Court. Thereafter the School Board filed with the Court the resolutions it had adopted in March 1963, and counsel for the plaintiffs filed objections to them as a plan for the subsequent operation of the schools.

The original plaintiffs having all been admitted to schools of their choice, two other pupils and their parents entered the case. They had applied on September 6, 1963 for admission to a high school attended predominantly by white pupils, and their applications had been denied as being too late. The District Judge promptly ordered their admission, since he had not approved the plan and its requirement that

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[3] Two transfer applications made on September 6, 1963 were denied as tardy. They are mentioned below.

transfer applications be filed before June 1 to be granted effectively for the ensuing school year. Thereafter, there was a further hearing as to the reasonableness and propriety of the resolutions adopted by the School Board, after which the Court filed a memorandum opinion on March 16, 1964 approving the Board's plan as construed and limited by the Court.[4]

In the posture in which the case comes to us, therefore, it appears that the School Board's resolutions, as construed by the District Court, provide for a freedom of choice by every individual in the Richmond school system as to the school he attends. There also is a requirement that the choice be affirmatively exercised by every pupil entering the system for the first time and by every other pupil as he moves from one level to another.

In finding that the plan, as operated, does provide for unrestricted freedom of choice, the District Judge largely disregarded the potential limitation of the school capacity

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[4] The School Board's resolutions, for instance, provide for denial of transfer applications when denial "is in the best interest of the pupil." Such a provision, of course, could provide a means of discrimination, and the District Court ordered that it not be applied in any case unless its purpose and effect were made definite and certain by an amendment, and the amendment had been approved by the Court. The School Board's resolutions also contain a limiting qualification that the chosen school must be equipped to meet the pupil's "program." This qualification the District Court approved with the admonition that it should be employed only when the courses the pupil seeks are not taught in the school he seeks to enter. Obviously, there is no discrimination involved if primary grade pupils are not allowed to enter high schools or when pupils are required to remain within other program subdivisions based upon objective criteria unrelated to race and applied without discrimination.

provision. For the present, we think he was justified in doing so. It had not been invoked at the time of the hearing for the purpose of denying any transfer application, and we are assured that it has not since then been invoked. Until some occasion arises for its invocation, it is irrelevant. Thereafter, what the School Board does may affect the validity of its operation,[5] but we are entitled to assume that the unrestricted freedom of choice which has been available to all pupils and parents in the school system for the past two school years will continue to be available, or that the School Board will make other adjustments which are approvable by the Courts.[6] The mere fact, however, of a possibility that capacity problems may affect the operation of the plan in future years has no immediate bearing upon the validity of what the School Board has done for the years now under consideration when the capacity limitation was inoperative.

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[5] There was testimony by one of the school officials that the intention was to proceed as do the Baltimore schools when a particular school reaches capacity; indeed, that the intention was to apply all of the Baltimore plan just as it is operated in Baltimore. Obviously, if the capacity limitation is so applied as to result in the denial of transfer applications of Negro pupils attending schools in which there are few or no white pupils upon the ground that all schools attended substantially by white pupils are over-capacity, there would be no "freedom of choice," as that term has been employed in this context. Such freedom exists in a practical sense only when a pupil wishing to attend a school with substantial numbers of the other race has an unequivocal and realizable right to do so. If his first choice be unavailable, some other reasonable alternative must be available to him.

[6] The District Court limited its approval of the plan prospectively, so that if and when the Board resorts to the capacity limitation, its use of it must be approvable.

The Negro plaintiffs do not question the present existence of an unrestricted freedom of choice in selection of schools. Their position on appeal is that freedom of choice is not an appropriate means for elimination of segregation. Extracting a phrase from the second Brown decision,[7] in which there was reference to "states requiring or permitting such discrimination," the plaintiffs insist that there are a sufficient number of Negro parents who wish their children to attend schools populated entirely, or predominantly, by Negroes to result in the continuance of some schools attended only by Negroes. To that extent, they say that, under any freedom of choice system, the state "permits" segregation if it does not deprive Negro parents of a right of choice.

It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. Everyone of every race has a right to be free of discrimination by the state by reason of his race. There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous.

The phrase from the second Brown decision as to which the plaintiffs refer lends no support to their contention. The first paragraph of the opinion, in which the phrase

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[7] Brown v. Board of Education, 349 U. S. 294, 298.

appears, clearly and precisely expresses the proscription against "discrimination." There is no hint of a suggestion of a constitutional requirement that a state must forbid voluntary associations or limit an individual's freedom of choice except to the entent that each individual's freedom of choice may be affected by the equal right of others. A state or a school district offends no constitutional requirement when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil, in effect, assigns himself to the school he wishes to attend.

This and other courts have repeatedly referred to the legality and propriety of a system of free transfers.

We first did so in Dillard v. School Board of City of Charlottesville, 4 Cir., 308 F. 2d 920, 923-4. In an opinion previously prepared by Senior Judge Soper, subsequently adopted per curiam as the opinion of the en banc court, there was approving reference to systems of unrestricted rights of transfer, which were said to have been conspicuously successful in Baltimore and in Louisville. Subsequently, in Jeffers v. Whitley, 4 Cir., 309 F. 2d 621, while condemning a compulsive system sought to be justified on the basis of assertions of volition of the pupils, we indicated en banc our approval of a truly voluntary system under which at reasonable intervals reasonable alternatives were available to all pupils, so that those who wished to do so might attend a school with members of the other race. Finally, when this case was before us earlier, this Court, anticipating the School Board's implementation of a system of free assignments and transfers, indicated its appropri-

ateness, provided pupils, parents and the public in general were all informed of it. We there said in summary:[8]

> "• • • As we clearly stated in Jeffers v. Whitley, 309 F. 2d 621, 629 (4th Cir. 1962), the appellants are not entitled to an order requiring the defendants to effect a *general intermixture of the races in the schools* but they are entitled to an order enjoining the defendants from refusing admission to any school of any pupil *because of the pupil's race.* The order should prohibit the defendants' conditioning the grant of a requested transfer upon the applicant's submission to futile, burdensome or discriminatory administrative procedures. If there is to be an absolute abandonment of the dual attendance area and 'feeder' system, if initial assignments are to be on a nondiscriminatory and voluntary basis, and if there is to be a right of free choice at reasonable intervals thereafter, consistent with proper administrative procedures as may be determined by the defendants with the approval of the District Court, the pupils, their parents and the public generally should be so informed." (Emphasis in original.)

Though the School Board's resolutions of 1963 were adopted before our previous opinion was announced, they were clearly in anticipation of it. As subsequently put into practice with the limitations and interpretations imposed upon them by the District Court, the School Board has fol-

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[8] Bradley v. School Board of City of Richmond, 4 Cir., 317 F. 2d 429, 438.

lowed precisely the suggestions of this Court made in this very case.

The underlying principle was originally announced by three-judge courts upon remand of two of the original school cases decided in Brown.[9] It has received recent affirmation in decisions in the Second, Fifth and Seventh Circuits, as well as in this one.

In the New Rochelle, New York, cases, after Judge Kaufman found that the all-Negro Lincoln School was in a gerrymandered zone deliberately drawn by the School Board for the purpose of segregating the school population,[10] the question arose as to the appropriate remedy. The School Board submitted a plan of limited transfers, which the District Court modified so as to make it a plan of substantially unrestricted tranfers. The modified plan was approved by the District Court.[11] Under this plan, each pupil in the Lincoln school was to be given the right to transfer to some other school in New Rochelle. Each transfer applicant was to be requested to list four other elementary schools in the order of his preference, and such applications would be granted subject to the capacity of the school, or schools, to which entry was sought. Transfer applications had to be submitted before June 1st to be con-

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[9] Briggs v. Elliott, E. D. S. C., 132 F. Supp. 776; Brown v. Board of Education, D. C. Kan., 139 F. Supp. 468.

[10] Taylor v. Board of Education of City School District of City of New Rochelle, D. C. S. D. N. Y., 191 F. Supp. 181.

[11] Taylor v. Board of Education of City School District of City of New Rochelle, D. C. S. D. N. Y., 195 F. Supp. 231.

sidered for the ensuing school year, and the parents of the transfer applicants were advised that they, themselves, would have to furnish whatever transportation was required.

The Court of Appeals for the Second Circuit affirmed the plan embodied in Judge Kaufman's decree.[12] It construed that plan as comparable to the Baltimore plan and said of it, "We think this plan an eminently fair means of grappling with the situation in accord with the principles stated in the Brown case."

Judge Moore dissented in Taylor. His primary disagreement was with the original finding that the Lincoln zone was gerrymandered, and that the School Board purposely imposed the racial character of the school. He also thought the permissive transfer plan, approved as an appropriate solution, was unfair because other pupils in the New Rochelle school district had no comparable rights. His dissent, however, suggests no disagreement with the principle that if all the pupils in a school district are given a substantially unfettered freedom of choice as to the schools they attend, the School Board fully complies with the requirements of the Brown case and its successors.

In Bell v. School City of Gary, Indiana, 7 Cir., 324 F. 2d 209, the Court, in approving assignments based upon geographic zoning, emphasized the Constitution's proscription against discrimination and the absence of any prohibition

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[12] Taylor v. Board of Education of the City School District of New Rochelle, 2 Cir., 294 F. 2d 36.

of segregation, itself. The inflexible geographic zoning system was approved, notwithstanding the fact that its product was de facto segregation in the schools.[13]

In Calhoun v. Latimer, 5 Cir., 321 F. 2d 302, Atlanta's inverted stair-step plan of desegregation was approved, notwithstanding it would not be accomplished until well within the 1970's, and notwithstanding that the only means provided for desegregation of the "desegregated" grades was permissive transfer, which, under the plan approved by the District Court, was allowable only if the applicant met certain criteria. His achievement, for instance, had to be at least as high as the average in the school to which he sought to be transferred. Judge Rives dissented, both because the transfer provision was restricted and because twelve years for the accomplishment of desegregation in all grades was too long. In denying a petition for rehearing, the majority made it clear that, in subsequent operation, transfer applications should be processed on a nondiscriminatory basis, and specifically required that the scholastic requirement be abandoned except to the extent it was required of white applicants.

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[13] See also Downs v. Kansas City Board of Education, 10 Cir., —— F. 2d —— (33 Law Week 2168); Lynch v. Kenston School District Board of Education, N. D. Ohio, 229 F. Supp. 740; Webb v. Board of Education of City of Chicago, N. D. Ill., 223 F. Supp. 466; Evans v. Buchanan, D. Del., 207 F. Supp. 820; Henry v. Godsell, E. D. Mich., 165 F. Supp. 87; Brown v. Board of Education, D. Kan., 139 F. Supp. 468, 470. Cf. Blocker v. Board of Education of Manhasset, New York, E. D. N. Y., 226 F. Supp. 208, and Branche v. Board of Education of Town of Hempstead, School District No. 1, E. D. N. Y., 204 F. Supp. 150.

The judgment in Calhoun v. Latimer was vacated by the Supreme Court.[14] The opinion of the Supreme Court recites that the Atlanta School Board had adopted "additional provisions offering free transfers with certain limitations" in the "desegregated" grades of the high schools. The Court thought that the new resolutions should be first appraised by the District Court after an evidentiary hearing, and, for that purpose, the case was remanded, with the admonition, based upon other recent cases, that the discretion for approval of a prolonged transition period is not so great now as it once was.

We, of course, would not have approved the transfer provisions considered by the Fifth Circuit in Calhoun v. Latimer.[15] The interesting thing, however, is that the Court approved a plan for the allowance of transfers as an appropriate device to bring the school system into compliance with the legal requirements. Even the Atlanta Board's most recent resolutions, adopted on April 8, 1964, were said by the Supreme Court to have contained factors to be considered by the Board in making initial assignments and in allowing transfers. If a remand was appropriate there, there is certainly no suggestion that provision for an unrestricted freedom of choice in initial assignments to each school level and in procuring transfers is not a permissible

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[14] 377 U. S. 263.

[15] Green v. School Board of City of Roanoke, Virginia, 4 Cir., 304 F. 2d 118; Dodson v. School Board of City of Charlottesville, Virginia, 4 Cir., 289 F. 2d 439; Jones v. School Board of City of Alexandria, Virginia, 4 Cir., 278 F. 2d 72.

and appropriate means of finally terminating all enforced segregation and bringing the school system into full compliance with the law.

That it is, was also indicated by the Supreme Court in its opinion in Goss v. Board of Education of Knoxville, 373 U. S. 683, 687. In disapproving a provision for minority transfers, it specifically noted that it would have an entirely different case if the plan provided for transfers regardless of the race of the applicant and the racial composition of the school to which he was assigned. Such a plan, the Supreme Court said, would permit freedom of choice "entirely free of any imposed racial considerations."

In addition to the cases previously considered, this Court has indicated that a system of free transfers superimposed upon a plan of geographic zoning is unobjectionable and permissible.[16] The plaintiffs suggest agreement that such an arrangement would be unobjectionable, but they urge that an approvable geographic scheme of original assignments must underlie a plan giving all pupils freedom of choice. We find, however, that an underlying geographic plan is not a prerequisite to the validity of a freedom of choice plan. A system of free transfers is an acceptable device for achieving a legal desegregation of schools.[17] Its accept-

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[16] Dodson v. School Board of City of Charlottesville, Virginia, 4 Cir., 289 F. 2d 439.

[17] Calhoun v. Latimer, 5 Cir., 321 F. 2d 302, *vacated and remanded* for another reason, 377 U. S. 263; Taylor v. Board of Education of City School District of City of New Rochelle, 2 Cir., 294 F. 2d 36; Dodson v. School Board of City of Charlottesville, Virginia, 4 Cir., 289 F. 2d 439 (plan found discriminatorily applied); Dillard v. School Board of City of Charlottesville, Virginia, 4 Cir., 308 F. 2d 920, 923-4.

ability is not dependent upon the concurrent use of some other device which also might be adequate. In this circuit, we do require the elimination of discrimination from initial assignments as a condition of approval of a free transfer plan.[18] Imposed discrimination is eliminated as readily by a plan under which each pupil initially assigns himself as he pleases as by a plan under which he is involuntarily assigned on a geographic basis.

The Richmond School Board was clearly told by the opinion of the District Judge after the first hearing that it must abolish its former system of dual zones. In the opinion of this Court in the first appeal, we affirmed and restated the obvious illegality of dual zoning.

The School Board might have complied with the directions of the District Court, affirmed here, by redrawing all zone boundaries so as to provide a single zone for each school without overlapping, but that would have been a major task and open to challenge everywhere as to whether zone lines were reasonably and fairly drawn without regard to race. The other means of abolishing the dual zone system was to do away with zones completely. From the point of view of the ultimate objective of eliminating the illegal dual zoning, dezoning seems the obvious equivalent of rezoning and, administratively, far easier of accomplishment when the School Board intends ultimate operation to be founded upon the free choice of the pupils.

It is suggested in this Court that fault should be attributed to the Board because "it has done nothing" since

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[18] Buckner v. County School Board of Greene County, Virginia, 4 Cir., 332 F. 2d 452.

our mandate went down following the first appeal. The suggestion is a perversion of the facts. The Board's resolutions of March 1963 were adopted, of course, before our mandate went down. They preceded the entry of the judgment, but, as subsequently construed and amended by the District Judge, they effectively abolished the dual zoning system, the feeder system and the requirement that transfer applications be considered in the light of discriminatory criteria. The resolutions effectively removed all of the objectionable features which the District Court had found in the procedures which had been followed earlier. That a defendant acquiesces in the adverse findings of the District Court and brings itself into compliance with the District Court's opinion before its affirmance on an appeal in which they are uncontested by the defendant is reason for some commendation and not for censure.

Of course, it is literally untrue that the Board has done nothing since the mandate of this Court in the first appeal went down. It has accepted the District Court's limitations upon and restriction of its March 1963 resolutions, and has actually operated under them as so construed and limited. Subsequent operation entirely free of any taint of the discriminatory practices which this Court condemned is substantial activity following in point of time the earlier judgment of this Court. If the Board's subsequent conduct fully complies with the earlier opinion of this Court, the Board is subject to no criticism whatever for having taken initial steps to bring itself in compliance with this Court's mandate before this Court formally acted.

II

The plaintiffs also complain that the District Court did not enjoin consideration of race in the assignment of teachers and administrative staff.

It has been held that when there is enforced segregation of pupils, an order requiring the desegregation of teachers and staff does not go "beyond the permissible range of the trial court's choice of means to put an end to an operation of schools on a racially segregated basis." [19] In such a case, the District Court may prefer other means, and when he employs more direct methods, exclusively, there generally will be involved no abuse of discretion.[20] In the usual case, so long as the ultimate objective is adequately served, the choice of means is finally, as well as initially, for the District Court.

In a particular factual setting, it may be contended that consideration of race in the assignment of teachers and staff coerces the pupils and effects a discrimination against them. The pupils have standing to raise such a question to the extent it involves an asserted denial of constitutionally protected rights of the pupils.[21] An appropriate allegation

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[19] Board of Public Instruction of Duval County Florida v. Braxton, 5 Cir., 326 F. 2d 616, 620.

[20] See Calhoun v. Latimer, 5 Cir., 321 F. 2d 302, vacated on other grounds, 377 U. S. 263.

[21] Griffin v. County School Board of Prince Edward County, Virginia, 4 Cir., —— F. 2d —— (decided Dec. 2, 1964); Northcross v. Board of Education of City of Memphis, Tenn., 6 Cir., 333 F. 2d 661; Jackson v. School Board of City of Lynchburg, Virginia, 4 Cir., 321 F. 2d 230; Mapp v. Board of Education of City

tendering such a question may not be stricken, for, whether in a particular case it may be regarded as a question of law or of fact, a resolution of so important a matter should await a full hearing on the merits.[22]

The question of assignment of teachers was ignored in the hearings below. The plaintiffs have made no effort to develop a record upon which a finding of actual discrimination against pupils could be predicated. There has been no inquiry as to the possible relation, in fact or in law, of teacher assignments to discrimination against pupils, nor has there been any inquiry as to the impact of such an order as the plaintiffs seek upon the administration of the schools and upon the teachers and the administrative personnel. The undeveloped record furnishes no basis for judgment apart from a conviction, in agreement with the Fifth Circuit,[23] that decision cannot precede a full and complete inquiry in the District Court into the merits.

When there has been no inquiry into the matter, it cannot be said that the plaintiffs have discharged the burden they must shoulder of showing that such assignments effect a denial of their constitutional rights.

Whether and when such an inquiry is to be had are matters with respect to which the District Court also has a

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of Chattanooga, Tenn., 6 Cir., 319 F. 2d 571; Augustus v. Board of Public Instruction of Escambia County, Florida, 5 Cir., 306 F. 2d 862; Christmas v. Board of Education of Harford County, Maryland, D. C. D. Md. 231 F. Supp. 331.

[22] Augustus v. Board of Public Instruction of Escambia County, Florida, 5 Cir., 306 F. 2d 862.

[23] Augustus v. Board of Public Instruction of Escambia County, Florida, 5 Cir., 306 F. 2d 862.

large measure of discretion. The Fifth[24] and Sixth[25] Circuits have so held, and we agree. When direct measures are employed to eliminate all direct discrimination in the assignment of pupils, a District Court may defer inquiry as to the appropriateness of supplemental measures until the effect and the sufficiency of the direct ones may be determined. The possible relation of a reassignment of teachers to protection of the constitutional rights of pupils need not be determined when it is speculative. When all direct discrimination in the assignment of pupils has been eliminated, assignment of teachers may be expected to follow the racial patterns established in the schools. An earlier judicial requirement of general reassignment of all teaching and administrative personnel need not be considered until the possible detrimental effects of such an order upon the administration of the schools and the efficiency of their staffs can be appraised along with the need for such an order in aid of protection of the constitutional rights of pupils.

III

Finally, the attorneys for the appellants ask an award of attorneys' fees. They asked for such fees in the District Court and were awarded a nominal fee because of their representation of the two additional plaintiffs whose entry into the school of their choice was ordered by the District

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[24] Augustus v. Board of Public Instruction of Escambia County, Florida, *supra*, note 23.

[25] Mapp v. Board of Education of City of Memphis, Tenn., 6 Cir., 319 F. 2d 571.

Judge, despite the fact that their applications were belated. While the District Court's order was otherwise generally unfavorable to the plaintiffs, and we affirm it here, the plaintiffs' attorneys say that as a result of their efforts in the first trial the plaintiffs obtained very substantial relief. It is true that the original plaintiffs did obtain substantial relief in the District Court in the first trial, and it is true also that we directed an award of attorneys' fees in Bell v. School Board of Powhatan County, Virginia, 4 Cir., 321 F. 2d 494.

It is only in the extraordinary case that such an award of attorneys' fees is requisite. In school cases throughout the country, plaintiffs have been obtaining very substantial relief, but the only case in which an appellate court has directed an award of attorneys' fees is the Bell case in this Circuit. Such an award is not commanded by the fact that substantial relief is obtained. Attorneys' fees are appropriate only when it is found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy. Whether or not the board's prior conduct was so unreasonable in that sense was initially for the District Judge to determine. Undoubtedly he has large discretion in that area, which an appellate court ought to overturn only in the face of compelling circumstances.

We can find no abuse of the District Court's discretion in refusing to allow attorneys' fees in a larger amount than it did.

We thus find no error in the District Court's order.

Affirmed.

Concurring and Dissenting Opinions of April 7, 1965

ALBERT V. BRYAN, Circuit Judge, concurring:

Just what more is the entitlement of the Negro pupils beyond what the Richmond School Board has done to eliminate racial discrimination in pupil attendance is not clear to me. I expressly note my concurrence in the present opinion, which is every way satisfactory, only to accent the view that the Board's concern, consideration and action have been exemplary. Besides, this attitude demonstrates the needlessness of the injunction we imposed in the prior Richmond appeal.

SOBELOFF and J. SPENCER BELL, Circuit Judges, concurring in part and dissenting in part:

We gravely doubt whether the Resolution of the Richmond School Board qualifies as a "plan of desegregation." In approving it, however, the District Court expressed several careful reservations and cautions to the Board which we understand our brethren of the majority accept and adopt as part of their affirmance. In light of this, and in the hope of encouraging the Board so to administer the Resolution as to make it a genuine and effective plan of desegregation, we concur in that part of the majority's affirmance. We feel constrained, however, to make such concurrence tentative on the assumption that the Resolution is an interim measure only and will be subject to full review and reappraisal either at the end of the present school year, or certainly not later than this fall after the reopening of the 1965-66 school term, when the results of two years of the Resolution's operation will be known.

Concurring and Dissenting Opinions of April 7, 1965

I

The Richmond School Board, in reading the majority opinion, must keep in mind the teaching of the Supreme Court, and this court as well, in a stream of cases decided during the past decade: that the initiative in achieving desegregation of the public schools must come from the school authorities. The paper Resolution is not being hailed as the attainment of the final goal. The defendants have only stated an hypothesis—that once Negro pupils are given the right to choose where they want to go to school they will be in a position to avail themselves of the opportunity and the segregated school system will disappear. The majority opinion permits that hypothesis to be tested against the realities of the Richmond situation to determine whether it will in fact achieve the desired result.

Only experience will show whether the so-called plan represents a real change in the officials' attitude toward their constitutional duty, or merely a strategic retreat to a new position behind which the forces of opposition will regroup.

While we join in permitting this experiment, we are not fully persuaded that the plan will be enough to enable the Negro pupils to extricate themselves from the segregation which has long been firmly established and resolutely maintained in Richmond. A procedure which might well succeed under sympathetic administration could prove woefully inadequate in an antagonistic environment. The procedure cannot be separated from the spirit that produced it and will motivate its application.

As the defendants claim that theirs is the "Baltimore Plan" for free determination of school assignments, it is in order to examine not only the text but the context of the Baltimore Plan. There are reasons why a Free Transfer System could achieve a measure of success in Baltimore.

Maryland is a border state which in the Civil War remained in the Union by a very slim margin. Baltimore is only 150 miles from Richmond. Before the *Brown* decision the traditions of the people of the two cities in regard to public education were not divergent. Baltimore's City Code also required separate schools for Negroes. The reception accorded the decision of May 17, 1954, however, was markedly different. Within two weeks thereafter, the City Solicitor of Baltimore ruled that all laws imposing segregation could no longer be considered constitutional. The members of the School Board and other public officials organized no program of resistance. There was no holding back for contested lawsuits to wind their way through the courts nor were they content to pass a resolution casting upon Negro children and their parents the onus of ending the existing system.

Promptly the Board took the initiative to integrate. In less than a month after the Court spoke, the Superintendent of Schools assembled every teacher in the Baltimore school system. He addressed them at length on the duty to abolish racial separatism in public education in an effort to prepare them for such steps as needed to be taken to make the Supreme Court decision effective in practice.[1] Similar meas-

[1] The following passage appears in the address delivered to the 5000 Baltimore teachers by Dr. John H. Fisher, now Dean of

ures were taken by the School Board to enlist the active support of the Co-ordinating Council of Parent-Teacher Organizations, which included men and women of both races.

Other meetings were held throughout the city under the sponsorship of the Department of Education to make the transition from a segregated to an integrated nonracial administration as smooth as possible, and school faculties were encouraged to receive graciously new pupils and staff members of the other race.

From time to time the Board on its own initiative reexamined the practical operation of its policies to assure their effectiveness. Notable is its forthright declaration that "the presence whenever possible of qualified persons of varied ethnic, cultural, religious, and educational backgrounds on the staff of a given school, bureau or division is considered desirable." [2]

Sharply contrasting has been the course of events in Richmond. Ten years after the Supreme Court's decision outlawing segregation, and five years after the invalidation of Virginia's massive resistance laws by the Supreme Court of Appeals of Virginia as well as the federal court, the School Board's attitude, as presented by its attorneys in

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Education at Columbia University, then the Superintendent of the Baltimore Department of Education:

> "Without fear and without subterfuge, our Board has met its responsibility. Paraphrasing the words of Robert E. Lee, we cannot now do more than our duty, we shall not want to do less * * *."

[2] "Equality of Educational Opportunity—A Progress Report for the Baltimore City Public Schools" (1964).

this case, is that "there is no duty upon the School Board to integrate a particular school or desegregate it" or to "promote integration." A change from this attitude is imperative if the Richmond declaration, whether it is called a Resolution or a Plan, is to be constitutionally implemented.

A plan of desegregation is more than a matter of words. The attitude and purpose of public officials, school administrators and faculties are an integral part of any plan and determine its effectiveness more than the words employed. If these public agents translate their duty into affirmative and sympathetic action the plan will work; if their spirit is obstructive, or at best negative, little progress will be made, no matter what form of words may be used.

Affirmative action means more than telling those who have long been deprived of freedom of educational opportunity, "You now have a choice." In many instances the choice will not be meaningful unless the administrators are willing to bestow extra effort and expense to bring the deprived pupils up to the level where they can avail themselves of the choice in fact as well as in theory. A court, before approving a plan, must scrutinize it in detail to satisfy itself that the assumptions upon which the plan is predicated are actually present. The district judge must determine whether the means exist for the exercise of a choice that is truly free and not merely pro forma. This may involve considering, for example, the availability of transportation, the opportunity to participate on equal terms in the life of the school after the pupil's arrival, and any other circumstances that may be pertinent.

All recognize that the problems of education are not simple and are intertwined with problems in other areas of public and private activity. But while a complete solution does not lie in the hands of the present defendants, there is much they can do in their own sphere of responsibility to disestablish the heritage arising from imposed racial discriminations of the past.

It is now 1965 and high time for the court to insist that good faith compliance requires administrators of schools to proceed actively with *their* nontransferable duty to undo the segregation which both by action and inaction has been persistently perpetuated. However phrased, this thought must permeate judicial action in relation to the subject matter.[3]

This is far from suggesting that children are to be uprooted arbitrarily and bussed against their will to distant places merely to place them with children of the other race. No such thing has been proposed or contemplated in Richmond or, so far as we know, anywhere in this circuit. The true alternative, however, surely is not abdication of Board

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[3] Speaking of the district court's duty in a similar context, the Supreme Court said:

> "[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

The Court also speaks of—

> "The need to eradicate past evil effects and to prevent the continuation or repetition in the future of the discriminatory practices * * *." Louisiana, et al. v. United States, 33 U. S. L. Week 4262 (U. S. March 8, 1965).